

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SHAWN KEVIN FROST,  
Plaintiff,

v.

CLARK E. DUCART, et al.,  
Defendants.

Case No. [17-cv-07228-YGR](#) (PR)

**ORDER OF PARTIAL DISMISSAL  
AND SERVICE**

**I. INTRODUCTION**

Plaintiff, a state prisoner currently incarcerated at California State Prison-Sacramento, has filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983. He has been granted leave to proceed *in forma pauperis*. Dkt. 8. The operative complaint in this action is the amended complaint, in which Plaintiff alleges constitutional rights violations at Pelican Bay State Prison (“PBSP”) where he was previously incarcerated. Dkt. 10 at 3-7.

Venue is proper because the events giving rise to the claims are alleged to have occurred at PBSP, which is located in this judicial district. *See* 28 U.S.C. § 1391(b).

In his amended complaint, Plaintiff has named the following Defendants at PBSP and the California Department of Corrections and Rehabilitation (“CDCR”): Warden Clark E. Ducart; Chief Deputy Warden D. W. Bradbury; Associate Warden C. Olsen; Captain T. S. Buchanan; Lieutenant D. Higginson; Sergeant J. Schrag; Correctional Officer T. Toussaint; Correctional Counselor II D. Wilcox; Office of Appeals Chief M. Voong; and Office of Appeals Captain M. Hodges. Dkt. 10 at 2. Plaintiff seeks declaratory relief and monetary damages. *Id.* at 3, 7.

**II. DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek

monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se* pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

### **B. Legal Claims**

Plaintiff alleges that Defendants, officials and employees of PBSP and the CDCR violated his constitutional rights. His claims arise from their alleged retaliation for his filing an appeal, log no. PBSP-16-01431, on July 6, 2016 naming several supervisory and custody staff as co-conspirators of malfeasance. Plaintiff alleges that three days later, on July 9, 2016, he was rehoused in a cell “which lacked a seat/stool, no desk or table to eat meals [or] write, no electrical power to use his approved personal property . . . and a broken sink . . . .” Dkt. 10 at 3. It seems Plaintiff was placed in such inadequate housing for approximately 5 months or until around November 2016 before he was “moved back to adequate and appropriate/normal general population housing.” *Id.* at 5-6. According to the amended complaint, Plaintiff filed another appeal, log no PBSP-16-01584, in which he raised his claims in this action. Plaintiff’s specific claims are as follows: (1) Defendants Schrag, Wilcox, and Buchanan retaliated against Plaintiff in violation of his First Amendment rights; and (2) Defendants Olsen, Bradbury, Higgerson, Hodges, Voong, and Toussaint were aware of the unconstitutional actions but failed to take correct action by denying his related grievance, also in violation of his First Amendment rights. Finally, Plaintiff names PBSP warden, Defendant Ducart, but Plaintiff does not claim that this Defendant personally violated his constitutional rights. Rather, Plaintiff seems to contend that Defendant Ducart is liable based on the conduct of his subordinates—the Defendants named above. Respondeat superior liability is not available under section 1983. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, Plaintiff must allege that the supervisory liability Defendants “participated in or directed the violations, or knew of the violations and failed to act to prevent them.” *Id.* Here, no facts are alleged to establish supervisory liability on the part of Defendant

1 Ducart. Accordingly, Plaintiff's supervisory liability claim against Defendant Ducart is  
2 DISMISSED without prejudice.

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court orders as follows:

5 1. Plaintiff's supervisory liability claim against Defendant Ducart is DISMISSED  
6 without prejudice.

7 2. The claims against the remaining Defendants have been found to be cognizable, as  
8 described above.

9 3. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of  
10 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the amended  
11 complaint and all attachments thereto (dkt. 10), and a copy of this Order to the following  
12 Defendants at PBSP and the CDCR: **Chief Deputy Warden D. W. Bradbury; Associate Warden**  
13 **C. Olsen; Captain T. S. Buchanan; Lieutenant D. Higgerson; Sergeant J. Schrag;**  
14 **Correctional Officer T. Toussaint; Correctional Counselor II D. Wilcox; Office of Appeals**  
15 **Chief M. Voong; and Office of Appeals Captain M. Hodges.** The Clerk shall also mail a copy of  
16 the amended complaint and a copy of this Order to the State Attorney General's Office in San  
17 Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

18 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure  
19 requires them to cooperate in saving unnecessary costs of service of the summons and amended  
20 complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the  
21 Court, on behalf of Plaintiff, to waive service of the summons, fail to do so, Defendants will be  
22 required to bear the cost of such service unless good cause can be shown for the failure to sign and  
23 return the waiver form. If service is waived, this action will proceed as if Defendants had been  
24 served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will  
25 not be required to serve and file an answer before **sixty (60) days** from the date on which the  
26 request for waiver was sent. (This allows a longer time to respond than would be required if formal  
27 service of summons is necessary.) Defendants are asked to read the statement set forth at the foot  
28 of the waiver form that more completely describes the duties of the parties with regard to waiver of

1 service of the summons. If service is waived after the date provided in the Notice but before  
2 Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date on  
3 which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed,  
4 whichever is later.

5 5. Defendants shall answer the amended complaint in accordance with the Federal  
6 Rules of Civil Procedure. The following briefing schedule shall govern dispositive motions in this  
7 action:

8 a. No later than **sixty (60) days** from the date their answer is due, Defendants  
9 shall file a motion for summary judgment or other dispositive motion. The motion must be  
10 supported by adequate factual documentation, must conform in all respects to Federal Rule of Civil  
11 Procedure 56, and must include as exhibits all records and incident reports stemming from the  
12 events at issue. A motion for summary judgment also must be accompanied by a *Rand*<sup>1</sup> notice so  
13 that Plaintiff will have fair, timely, and adequate notice of what is required of him in order to  
14 oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out  
15 in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss for  
16 failure to exhaust available administrative remedies must be accompanied by a similar notice.  
17 However, the Court notes that under the new law of the circuit, in the rare event that a failure to  
18 exhaust is clear on the face of the amended complaint, Defendants may move for dismissal under  
19 Rule 12(b)(6), as opposed to the previous practice of moving under an unenumerated Rule 12(b)  
20 motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (overruling *Wyatt v. Terhune*, 315  
21 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative  
22 remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by a  
23 defendant as an unenumerated Rule 12(b) motion). Otherwise, if a failure to exhaust is not clear on  
24 the face of the amended complaint, Defendants must produce evidence proving failure to exhaust in  
25 a motion for summary judgment under Rule 56. *Id.* If undisputed evidence viewed in the light  
26 most favorable to Plaintiff shows a failure to exhaust, Defendants are entitled to summary judgment  
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28 <sup>1</sup> *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 under Rule 56. *Id.* But if material facts are disputed, summary judgment should be denied and the  
2 district judge, rather than a jury, should determine the facts in a preliminary proceeding. *Id.* at  
3 1168.

4 If Defendants are of the opinion that this case cannot be resolved by summary judgment,  
5 Defendants shall so inform the Court prior to the date the summary judgment motion is due. All  
6 papers filed with the Court shall be promptly served on Plaintiff.

7 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
8 and served on Defendants no later than **twenty-eight (28) days** after the date on which Defendants'  
9 motion is filed.

10 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of the  
11 Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must  
12 do in order to oppose a motion for summary judgment. Generally, summary judgment must be  
13 granted when there is no genuine issue of material fact—that is, if there is no real dispute about any  
14 fact that would affect the result of your case, the party who asked for summary judgment is entitled  
15 to judgment as a matter of law, which will end your case. When a party you are suing makes a  
16 motion for summary judgment that is supported properly by declarations (or other sworn  
17 testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific  
18 facts in declarations, depositions, answers to interrogatories, or authenticated documents, as  
19 provided in Rule 56(c), that contradict the facts shown in the defendant's declarations and  
20 documents and show that there is a genuine issue of material fact for trial. If you do not submit  
21 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.  
22 If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand*, 154  
23 F.3d at 962-63.

24 Plaintiff also is advised that—in the rare event that Defendants argue that the failure to  
25 exhaust is clear on the face of the amended complaint—a motion to dismiss for failure to exhaust  
26 available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit  
27 without prejudice. To avoid dismissal, you have the right to present any evidence to show that you  
28 did exhaust your available administrative remedies before coming to federal court. Such evidence

1 may include: (1) declarations, which are statements signed under penalty of perjury by you or  
2 others who have personal knowledge of relevant matters; (2) authenticated documents—documents  
3 accompanied by a declaration showing where they came from and why they are authentic, or other  
4 sworn papers such as answers to interrogatories or depositions; (3) statements in your amended  
5 complaint insofar as they were made under penalty of perjury and they show that you have personal  
6 knowledge of the matters state therein. As mentioned above, in considering a motion to dismiss for  
7 failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment motion under  
8 Rule 56, the district judge may hold a preliminary proceeding and decide disputed issues of fact  
9 with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

10 (The notices above do not excuse Defendants’ obligation to serve similar notices again  
11 concurrently with motions to dismiss for failure to exhaust available administrative remedies and  
12 motions for summary judgment. *Woods*, 684 F.3d at 935.)

13 d. Defendants shall file a reply brief no later than **fourteen (14) days** after the  
14 date Plaintiff’s opposition is filed.

15 e. The motion shall be deemed submitted as of the date the reply brief is due.  
16 No hearing will be held on the motion unless the Court so orders at a later date.

17 6. Discovery may be taken in this action in accordance with the Federal Rules of Civil  
18 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose  
19 Plaintiff and any other necessary witnesses confined in prison.

20 7. All communications by Plaintiff with the Court must be served on Defendants or  
21 Defendants’ counsel, once counsel has been designated, by mailing a true copy of the document to  
22 them.

23 8. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court  
24 informed of any change of address and must comply with the Court’s orders in a timely fashion.  
25 Pursuant to Northern District Local Rule 3-11, a party proceeding *pro se* whose address changes  
26 while an action is pending must promptly file a notice of change of address specifying the new  
27 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail  
28 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and

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(2) the Court fails to receive within sixty days of this return a written communication from the *pro se* party indicating a current address. *See* L.R. 3-11(b).

9. Upon a showing of good cause, requests for a reasonable extension of time will be granted provided they are filed on or before the deadline they seek to extend.

IT IS SO ORDERED.

Dated: January 16, 2019

  
YVONNE GONZALEZ ROGERS  
United States District Judge